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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 MARY M. TARDIF,

4 Plaintiff,

5 v.

13CV04056 (KMW)  
Trial

6 CITY OF NEW YORK,

7 Defendant.

8 -----x

New York, N.Y.  
June 30, 2022  
8:30 a.m.

9  
10 Before:

11 HON. KIMBA M. WOOD,

12 District Judge  
13 and Jury

14 APPEARANCES

15 REZVANI LAW FIRM, PLLC  
Attorneys for Plaintiff

16 BY: REZA REZVANI

-and-

17 COMMUNITY LEGAL ASSISTANCE CORP.

18 BY: STEFAN HILLEL KRIEGER

-and-

GIDEON ORION OLIVER

19 BY: GIDEON ORION OLIVER

20  
21 NEW YORK CITY LAW DEPARTMENT  
Attorneys for Defendant

22 BY: HANNAH VICTORIA FADDIS

MICHAEL VIVIANO

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(Trial resumed; jury not present)

THE COURT: Good morning, counsel. On my agenda are four items: Whether to exclude Exhibit M, counsel's response to new language that my law clerk e-mailed to you regarding future damages. I need to rule on whether there should be a nominal damages instruction, and then we will get to defendant's rule 50 motion.

Do you have anything else for the agenda before the jury comes in?

MR. REZVANI: Not for the plaintiff, your Honor.

MS. FADDIS: Not for the defendant, your Honor.

THE COURT: Okay. With respect to Defendant's Exhibit M, the rule 608(b) is clear that counsel may examine on the matter at issue in this case but that the exhibit itself is excludable, must be excluded under 608(b). The case law supports that.

MS. FADDIS: Your Honor, could I just ask one clarifying question?

THE COURT: Yes.

MS. FADDIS: Which is the exception to that rule that was noted in both of the defendant's letters would seem applicable in this situation.

THE COURT: May I ask, I think one of the cases you cited was a non-witness statement. Let me go back to that. What case do I need to look in? I'm sure it's in your letter.

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1 THE COURT: Wait a minute. What do you want to talk  
2 about?

3 MR. KRIEGER: I just wanted to tell you the page of  
4 the transcript where Exhibit M --

5 THE COURT: Why does the page matter?

6 MR. KRIEGER: You had asked us for it, but I won't  
7 give it.

8 THE COURT: You don't have to tell me if it's in the  
9 record, if what I did is consistent with my ruling today.

10 MR. KRIEGER: Thank you.

11 THE COURT: Thank you. Let's talk about the new  
12 language on future damages. Have counsel had an opportunity to  
13 review the revised draft instruction on future damages which  
14 was sent to you late at night last night? If you had not had  
15 an opportunity, I'll give you that time now.

16 MS. FADDIS: Defendant has no objection to the new  
17 charge, your Honor.

18 MR. REZVANI: With respect to future damages, no.  
19 It's fine.

20 THE COURT: You have no objection?

21 MR. REZVANI: I have no objection.

22 THE COURT: Good. Okay.

23 Nominal damages, I'd like to hear each party on that.  
24 I believe there's case law both ways; so the question is what  
25 is the weight of each precedent?

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1 MR. OLIVER: Your Honor, who would you like to hear  
2 from first?

3 THE COURT: You.

4 MR. OLIVER: Thank you, your Honor. So I think the  
5 answer is in *Vilkhu*, V-i-l-k-h-u, which is a Judge Sifton's  
6 case, that was affirmed by the Second Circuit, and that's why I  
7 think it's the answer because the Second Circuit affirmed it.  
8 And in *Vilkhu* -- I have a copy, if it would be helpful, to hand  
9 up. I apologize that I don't have the correct number of  
10 copies.

11 THE COURT: Has defense counsel read *Vilkhu*?

12 MR. OLIVER: I'm certain because it was in my briefing  
13 that they responded to.

14 THE COURT: Wait. It's a question for defense.

15 MR. OLIVER: I'm sorry, your Honor.

16 MS. FADDIS: Yes, your Honor.

17 THE COURT: I know that was confusing. You said yes,  
18 you're familiar with it?

19 MS. FADDIS: I'm familiar with it, your Honor.

20 MR. OLIVER: So *Vilkhu* was affirmed by the Second  
21 Circuit, and in *Vilkhu*, what the Court says is that the nominal  
22 damages charge --

23 THE COURT: Could you give me a page citation?

24 MR. OLIVER: Sure, your Honor. The page 3 of 9, on  
25 the section, omission of nominal damages charge.

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1 THE COURT: Okay. And where are you with that?

2 MR. OLIVER: That has the factual background and the  
3 actual statement about the charge error is on page 6 of -- the  
4 analysis of charge error is on page 6 of 9; so that's where I  
5 would go.

6 THE COURT: Okay. Please pause while I read that.

7 MR. OLIVER: Thank you, your Honor. The second  
8 paragraph --

9 THE COURT: I'm asking, go ahead.

10 MR. OLIVER: "Courts have long recognized," I think,  
11 through to the end of that page, "strategic choice."

12 THE COURT: Where is "Courts"?

13 MR. OLIVER: It's the second paragraph on page 6 of 9  
14 in the printed decision, and I also quoted it in my letter.

15 THE COURT: Okay. I'm reading it now.

16 MR. OLIVER: Thank you, your Honor.

17 (Pause)

18 THE COURT: I have a question for plaintiff's counsel.

19 MR. OLIVER: Yes, your Honor.

20 THE COURT: If the jury were to find liability for  
21 assault, battery or both, but find that there was no actual  
22 injury such that they do not mark down an award of damages,  
23 what is your position as to what -- who should decide zero  
24 damages and how that should be conveyed, if at all, to the  
25 jury? So what would the verdict sheet read? Would it be

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1 liability damages, yes; damages, zero?

2 MR. OLIVER: That's right.

3 THE COURT: And you don't want me to instruct the jury  
4 nominal damages.

5 MR. OLIVER: No, and --

6 THE COURT: And your view is simply that zero means  
7 nominal?

8 MR. OLIVER: Well, my view is that zero means zero.  
9 So that's right, your Honor. So going down the verdict form,  
10 if the jury says yes on either of the first two questions about  
11 liability, and then says no, has Ms. Tardif proven up  
12 compensatory damages, that's it, they're done.

13 THE COURT: All right. Now, what's the harm of  
14 mentioning nominal damages?

15 MR. OLIVER: It's serious because it's her right.  
16 She --

17 THE COURT: Wait, what is serious?

18 MR. OLIVER: The harm would be serious, your Honor.

19 THE COURT: And what is the harm?

20 MR. OLIVER: It's Ms. Tardif's right. She wants to  
21 waive it. It's Ms. Tardif's right. She wants to waive it. As  
22 Vilkhov points out, having the charge before the jury invites  
23 compromise, and this is -- this case, like the prior case, is  
24 going to go to the jury just before a holiday weekend.  
25 Notwithstanding the Court's careful instructions, you know,

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1 there's going to be a time crunch.

2 And if the jury has the option of awarding nominal  
3 damages, even though Ms. Tardif has said that she'll waive any  
4 right that she would have to nominal damages, I think that's  
5 error, and it's error because -- it would be error, I think,  
6 because of the -- because it's her choice, because it is  
7 important to the Court --

8 THE COURT: Okay. May I ask you, what is your  
9 authority for it being her choice not to include language?

10 MR. OLIVER: Vilku. That's the main case, and it was  
11 affirmed by the Second Circuit, your Honor. By the way, as I  
12 mention in my letter, in a summary order --

13 THE COURT: Let me read that again. You said on page  
14 6?

15 MR. OLIVER: Right. Starting on page 6 of 9, "Courts  
16 have long recognized the importance of the nominal damages  
17 award."

18 THE COURT: "As a means for plaintiff to vindicate a  
19 violation."

20 MR. OLIVER: That's right. It's plaintiff's  
21 entitlement. It's plaintiff's right.

22 THE COURT: I'm sorry, just pause there.

23 MR. OLIVER: Of course, your Honor.

24 (Pause)

25 May I say one more thing on the question, your Honor?

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1 THE COURT: Could you wait a minute?

2 MR. OLIVER: Of course.

3 (Pause)

4 (Continued on next page)

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1           THE COURT: Counsel, with respect to nominal damages,  
2           there are good arguments each way, and I think there's  
3           authority -- I'm going to strike that because I'm looking at  
4           the totality of the cases, and there is not authority for what  
5           I was about to say.

6           I'm going to include a charge on nominal damages  
7           notwithstanding that plaintiff's counsel has made the point  
8           that such a charge might lead to a compromise in the case that  
9           would be unlawful because of case law favoring giving the  
10          charge.

11          Now we'll look at the language on the charge in a  
12          little time.

13          MR. OLIVER: May I just be heard briefly, your Honor?  
14          I'd like to make a record to support my objection.

15          THE COURT: Yes.

16          MR. OLIVER: Thank you.

17          So in *Vilkhu*, the Court made it clear that it's the  
18          plaintiff's right -- the plaintiff should be allowed to  
19          determine whether to seek both nominal and compensatory  
20          damages, and in the footnote, a plaintiff is entitled to  
21          determine independently the type of relief he or she will seek.

22          So I think the defendant, *Vilkhu* makes clear, doesn't  
23          have a right to a nominal damages charge because in *Vilkhu*,  
24          they asked for a nominal damages charge. The court didn't give  
25          one. They made a motion for new trial. The court denied the

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1 motion for new trial, and the Second Circuit affirmed.

2 THE COURT: On the ground that?

3 MR. OLIVER: Explicitly agreeing with the court's  
4 opinion in *Vilkhu* on this point.

5 THE COURT: Meaning?

6 MR. OLIVER: Meaning the Second Circuit agreed with  
7 Judge Sifton that it was not the defendant's right to request a  
8 nominal damages charge, and that Judge Sifton was correct to  
9 respect the plaintiff's decision to waive nominal damages. So  
10 here we have a case where plaintiff is willing to waive --

11 THE COURT: Go ahead. Make your record.

12 MR. OLIVER: -- is willing to waive nominal damages.  
13 But if the Court rules that the charge will be included, that  
14 is essentially a right that the Court will have taken away from  
15 her in this case. So that's why I think it's error, even if  
16 the Court doesn't think that -- disagrees about the extent of  
17 the prejudice.

18 What I wanted to point out about *Randolph*, Judge  
19 Cote's decision, is that Judge Cote offered the plaintiff the  
20 choice, right? Judge Cote issued an order saying if you  
21 decide, as Ms. Tardif said that she will do, to waive nominal  
22 damages, then the case will go a certain way. That's exactly  
23 the choice that Ms. Tardif -- I think it's her right to make  
24 and that she is making.

25 THE COURT: All right. Now you're predicating your

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1 argument on it being her "right."

2 MR. OLIVER: Yes.

3 THE COURT: Could you look at footnote 6 in *Vilkhu*.

4 MR. OLIVER: Yes.

5 THE COURT: It's on page 6 of 9.

6 MR. OLIVER: I have it, your Honor.

7 THE COURT: OK.

8 MR. OLIVER: And the end of the footnote says, "A  
9 plaintiff is entitled to determine independently the type of  
10 relief he or she will seek," which is what Ms. Tardif is  
11 seeking to do here. And the footnote is at the end of the  
12 sentence that begins, "In such cases, cases such as this one, a  
13 plaintiff should be allowed" --

14 THE COURT: Wait a minute. You should tell me where  
15 to begin and then tell me.

16 MR. OLIVER: I apologize, your Honor. I was beginning  
17 at the end of footnote 6 with the last sentence in footnote 6.

18 THE COURT: Yes.

19 MR. OLIVER: That sentence ends -- I'll read the whole  
20 sentence. It's short: "Regardless of the cost or benefit to  
21 the plaintiff, a plaintiff is entitled to determine  
22 independently the type of relief he or she will seek."

23 And that footnote is attached to the sentence: "In  
24 such cases," cases such as this, "a plaintiff should be allowed  
25 to determine whether to seek both nominal and compensatory

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1 damages, or whether to remove the option of nominal damages  
2 from the jury's consideration and instead seek an outcome in  
3 his case based on his showing of proximately caused actual  
4 injury. To afford a defendant an equal right to a nominal  
5 damages charge in such a case would preclude a plaintiff from  
6 making this strategic choice."

7 That's the choice Ms. Tardif has made, and so that's  
8 what I'm pointing to.

9 And just to answer the Court's question, the only part  
10 of the summary opinion in *Vilkhu* -- I'm sorry, in the Second  
11 Circuit, the court said, with respect to defendant's arguments  
12 regarding the nominal damages jury instruction, where  
13 defendants had appealed the court's decision not to include a  
14 nominal damages jury instruction as error, the Second Circuit  
15 says, "We affirm for substantially the reasons set forth in the  
16 district court's memorandum," which I just read to you.

17 So that is the Second Circuit saying that Judge Sifton  
18 was right. It's the plaintiff's right, it's not the defendant,  
19 and it's not error.

20 THE COURT: Pause for a moment.

21 MR. OLIVER: Thank you, your Honor.

22 THE COURT: All right.

23 MS. FADDIS: Your Honor, could defendant respond?

24 THE COURT: Yes. Thank you.

25 MS. FADDIS: I'll be brief. On *Vilkhu*, the

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1 defendant's position is that, reading Judge Sifton's order,  
2 it's clear that there were numerous grounds on which he issued  
3 his opinion. In the first instance, he opined that it was not  
4 error to include the nominal damages charge, but went on to  
5 say, even if it were, it wasn't prejudicial error. The Second  
6 Circuit did not differentiate in its summary order on which of  
7 those grounds it upheld his decision. It simply said "for  
8 substantially the same reasons" and did not discuss the  
9 substance of the opinion. In that regard, I don't think the  
10 summary order of the Second Circuit can be read to explicitly  
11 or definitively agree with Judge Sifton that this was not  
12 error.

13 And the second point I would make is that Judge  
14 Sifton's decision very clearly and repeatedly specifies that it  
15 applies his -- his holding applies in such a case, I believe is  
16 the language he uses. He refers to a specific type of case,  
17 which I think also undercuts the plaintiff's argument that this  
18 is a universal right of a plaintiff.

19 THE COURT: What is that type of case?

20 MS. FADDIS: It's -- to be honest, your Honor, not  
21 entirely clear to me, but I don't think that it stands for the  
22 sweeping proposition that the plaintiff has cited it for, which  
23 is that in any case it is the plaintiff's exclusive right to  
24 ask for a nominal damages charge.

25 THE COURT: I understand.

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1 MR. OLIVER: May I just say one other thing, two  
2 sentences, your Honor?

3 THE COURT: Yes.

4 MR. OLIVER: Judge Cote gave the plaintiff in *Randolph*  
5 the choice, and I'm asking the Court to do the same thing.

6 THE COURT: I know she did. Thank you.

7 MR. OLIVER: Thank you, your Honor.

8 THE COURT: I want to make sure that the record is  
9 clear with respect to a waiver that would be found here.

10 Mr. Oliver, the last sentence of footnote -- of the  
11 first paragraph of footnote 6 from *Vilkhu* reads: "Without the  
12 option of a nominal damages award, if a plaintiff fails to  
13 prove compensable injury proximately caused by defendant's  
14 conduct, the plaintiff often loses both his case and the claim  
15 for attorney's fees."

16 So you're waiving a finding for her on liability.

17 MR. OLIVER: I'm not sure that's the case, your Honor,  
18 but I don't think that the Court needs to decide that question  
19 right now to decide whether it's OK for her to waive nominal  
20 damages. I actually disagree with that, and I have some  
21 support for this. I think, as I said, the jury could say yes  
22 on one of the first two questions on the charge sheet, on the  
23 verdict sheet, and then no to the third question. And then  
24 plaintiff will still --

25 THE COURT: The second question is?

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1 MR. OLIVER: Has she proven compensable -- has she  
2 proven any compensatory damages?

3 THE COURT: So you're assuming a "yes" answer to two  
4 of three things?

5 MR. OLIVER: "Yes" to liability, "no" to compensatory  
6 damages.

7 THE COURT: Oh.

8 MR. OLIVER: I think she still wins the case. I just  
9 don't think she wins damages, because damages are not an  
10 element of a tort claim of assault and battery.

11 THE COURT: All right. Wins the case.

12 MR. OLIVER: Wins the case meaning the judgment is for  
13 her. It's just she doesn't get any money.

14 THE COURT: Right, a judgment showing liability.

15 MR. OLIVER: But no damages, that's right.

16 THE COURT: OK.

17 MR. OLIVER: And Ms. Tardif accepts that. She is  
18 willing to accept that. I've asked her. She's nodding  
19 vigorously. And whatever assurances the Court might need on  
20 the record about that waiver, we can certainly give the Court.  
21 I put it in writing in my letter, and I'm prepared to affirm  
22 them here. I happen to disagree about, I think, that the  
23 consequences would be a loss -- a technical loss for her of the  
24 case. Of course, attorney's fees aren't at issue in this case.

25 THE COURT: We're not talking about that.

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1 MR. OLIVER: Right. Understood.

2 THE COURT: What support do you have for the first  
3 part of your last sentence?

4 MR. OLIVER: Sorry, your Honor, what was the first  
5 part?

6 THE COURT: What support do you have for the first  
7 part of your last sentence?

8 MR. OLIVER: I don't remember the first part of my  
9 last sentence, I'm so sorry.

10 THE COURT: OK. That she is waiving the right to a  
11 finding that -- the proposition has been put forward that she,  
12 by not seeking a nominal damage charge, is waiving the right to  
13 a finding of liability.

14 MR. OLIVER: I don't think that's the case.

15 THE COURT: Well, I know what you think, but do you  
16 have support for that in the case law?

17 MR. OLIVER: Sure, your Honor, because in the second  
18 letter, reply letter that I submitted, I --

19 THE COURT: Give me a moment to find it.

20 MR. OLIVER: Yes, your Honor.

21 THE COURT: If you'll go slowly, I don't have to have  
22 it right in front of me now.

23 MR. OLIVER: Yes.

24 THE COURT: Although I think I do. This is the  
25 June 28?



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1 MR. OLIVER: It's June 29. This was the middle of the  
2 night --

3 THE COURT: I have June 29.

4 MR. OLIVER: On the second page, addressing a question  
5 the Court posed in *Randolph* --

6 THE COURT: Just a moment.

7 MR. OLIVER: Yes, your Honor. I have another copy of  
8 this letter.

9 THE COURT: I'm sorry. I have it in front of me now.

10 MR. OLIVER: Thank you, your Honor.

11 THE COURT: Second page, and where do I look, line  
12 what?

13 MR. OLIVER: The second paragraph.

14 THE COURT: OK.

15 MR. OLIVER: Where I quote Judge Forrest.

16 THE COURT: OK. I'll read it.

17 I think we must be looking at a different copy.

18 MR. OLIVER: May I quote briefly?

19 THE COURT: Yes.

20 MR. OLIVER: So in a case that defense counsel cited  
21 in their opposition letter, I cited from in my reply letter,  
22 the judge in that case, which is the *Wright* case --

23 THE COURT: Go ahead.

24 MR. OLIVER: W-r-i-g-h-t, Judge Forrest pointed out  
25 that assault and battery do not require proof of actual

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1 damages, and that the -- Judge Forrest quotes -- sorry, cites a  
2 Second Circuit case, and the parenthetical that Judge Forrest  
3 provides is noting that although evidence of injury is not  
4 necessary to establish liability for assault and battery, such  
5 evidence is required if the plaintiff is to sustain a claim for  
6 compensatory damages caused by the assault and battery.

7 So if there's no proof of actual -- if there's a  
8 liability finding "yes" to one of the first two boxes, but  
9 there's no proof of actual injury, I think what happens is  
10 there's a liability finding, and she gets a judgment for no  
11 money. It's just the judgment for liability.

12 THE COURT: And you're saying that what you have as  
13 support for that is a decision by Judge Forrest?

14 MR. OLIVER: Citing a Second Circuit decision. I also  
15 have one other case.

16 THE COURT: What was the holding of the Second  
17 Circuit?

18 MR. OLIVER: The parenthetical from Judge Forrest is  
19 that although evidence of injury is not -- essentially that  
20 evidence of injury is not necessary to establish liability.  
21 So, in other words, if the jury finds liability but no proof of  
22 injury that could be subject to a compensatory damages  
23 calculation, there's still a finding of liability. And I think  
24 that's still a win technically.

25 The other case that I have, and I'll show it to you.

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1 THE COURT: Could you pause for a moment.

2 MR. OLIVER: Of course, your Honor. And I'll show  
3 this case to opposing counsel.

4 THE COURT: Just pause.

5 Mr. Oliver.

6 MR. OLIVER: Yes, your Honor.

7 THE COURT: The Second Circuit decision in 1977 in  
8 *Mission v. Famous Music Corp.* is that if a plaintiff  
9 establishes an assault, battery, or false arrest but does not  
10 adduce any evidence of actual -- the fact finder must award  
11 nominal damages.

12 MR. OLIVER: Could I have the cite, your Honor,  
13 because that's what -- sorry.

14 THE COURT: Yes.

15 MR. OLIVER: That may well be true, unless she's  
16 waived the right to nominal damages. Many of these cases use  
17 that language, and it's because the issue comes up where  
18 there's a question as to whether like a --

19 THE COURT: Let's not --

20 MR. OLIVER: Understood.

21 THE COURT: You want to look it up?

22 MR. OLIVER: I do.

23 THE COURT: Look it up quickly, because the jury's  
24 been waiting 20 minutes.

25 MR. OLIVER: Of course, your Honor.

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1 THE COURT: The cite is 557 F.2d 918 at page 926. I'm  
2 sorry. I'm sorry.

3 MR. OLIVER: I'm sorry, your Honor. I do know this  
4 case, I think.

5 THE COURT: Just one minute.

6 MR. OLIVER: Yes.

7 THE COURT: Mr. Oliver, you wanted to say something,  
8 and then I want to say something.

9 MR. OLIVER: Yes, your Honor.

10 THE COURT: Go ahead.

11 MR. OLIVER: I address this in the June 29 letter, the  
12 *Contemporary Mission* case, the --

13 THE COURT: A little slower for the court reporter.

14 MR. OLIVER: There's no citation in the case law in  
15 *Contemporary Mission* for the proposition that Judge Forrest  
16 cites it for in *Wright*, although the proposition itself is  
17 true. A court must -- in other words, a jury must award  
18 nominal damages unless the plaintiff has waived her right to  
19 nominal damages. So *Wright* doesn't address -- I'm sorry,  
20 *Contemporary Mission* does not address that issue. And it's  
21 also, I would point out --

22 THE COURT: I'm sorry. Does she waive her right to a  
23 verdict in her favor?

24 MR. OLIVER: I don't think that's -- I don't think it  
25 would be fair for the Court to make her do that.

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1 THE COURT: Well --

2 MR. OLIVER: I don't think *Contemporary Mission*  
3 says -- sorry, your Honor.

4 THE COURT: Are you aware of an example of any New  
5 York State decision in which there was a verdict for plaintiff  
6 but the jury found no compensatory, no other damages?

7 MR. OLIVER: *Nelson v. Town of Glenville*.

8 THE COURT: OK. If it's in your letter --

9 MR. OLIVER: It's not. I just found it this morning,  
10 your Honor. It just occurred to me that these questions might  
11 come up.

12 THE COURT: Go ahead. *Nelson*.

13 MR. OLIVER: I'm happy to hand it up, 220 A.D.2d 955.  
14 I've underlined -- already given it to opposing counsel, and  
15 I've underlined the relevant language.

16 THE COURT: All right. My clerk's about to hand it to  
17 me.

18 MR. OLIVER: Thank you, your Honor. I do have one  
19 other case.

20 THE COURT: Please wait.

21 MR. OLIVER: Yes, your Honor.

22 THE COURT: Mr. Oliver.

23 MR. OLIVER: Yes, your Honor.

24 THE COURT: With respect to Judge Cote's decision, her  
25 order allowed plaintiff to waive the request for an award of

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1 nominal damages but explained that should the jury fail to  
2 award compensatory damages, "a verdict in favor of defendants  
3 shall be entered notwithstanding any jury finding of  
4 liability." That cuts against what you just said. As in your  
5 Gatz case, the jury imposed no damages but did find that Gatz  
6 was battered. Judgment was entered dismissing the complaint.  
7 So those two cut against you.

8 MR. OLIVER: Well, first of all, your Honor, Judge  
9 Cote provides no authority for that --

10 THE COURT: That's OK. She's Judge Cote.

11 MR. OLIVER: Of course, your Honor, I understand. I'm  
12 just saying she may have been wrong, and I happen to think she  
13 was wrong in this case because there was no authority.

14 And just to be clear, your Honor, I disagree with the  
15 Court. We're having a legal argument about this, but  
16 Ms. Tardif is prepared, if the Court determines -- disagrees  
17 and determines that the consequence of her waiver of her right  
18 to nominal damages is that at the end of the -- if the jury  
19 does not find compensatory damages, there is a verdict for the  
20 defendants, and she's potentially on the -- defendant, sorry,  
21 and she's potentially on the hook --

22 THE COURT: What is she waiving?

23 MR. OLIVER: I'm sorry?

24 THE COURT: Precisely what is she waiving?

25 MR. OLIVER: Her right to recover between zero and one

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1 dollar in nominal damages.

2 THE COURT: She's not waiving her right to a finding  
3 of liability?

4 MR. OLIVER: That's right, your Honor.

5 THE COURT: OK. I disagree with you. I'm going to  
6 include a nominal damages charge.

7 MR. OLIVER: I'm sorry, your Honor. What I'm saying  
8 is if the Court -- if the Court is deciding that the  
9 consequence of the waiver would be that she loses the trial,  
10 then I disagree with that, and I would like to lodge an  
11 objection. But she will -- she is still willing to waive her  
12 right to nominal damages even if that is the consequence. I  
13 just would make an objection for the record and --

14 THE COURT: Well, we need to know more than that. I'm  
15 going to stick with my decision, and I'd like to move on to any  
16 other issue we need to take up.

17 MR. OLIVER: When the Court says "we need to know more  
18 than that," what more does the Court need to know from  
19 Ms. Tardif?

20 THE COURT: We need to know more on the law.

21 MR. OLIVER: Which aspect?

22 THE COURT: What she cares about, if there are no  
23 compensatory damages or nominal, what she cares about is a  
24 finding of liability, right? Are you telling me she waives a  
25 finding of liability? I think your answer is --

M6UHTar2

1 MR. OLIVER: My answer is no.

2 THE COURT: You answered no at first and then yes  
3 later.

4 MR. OLIVER: The answer to that is no, your Honor.

5 THE COURT: In light of that, I'm going to give a  
6 charge on nominal damages. If you want to argue further, you  
7 can argue at the point where I come to that in the charge.

8 MR. OLIVER: Thank you, your Honor.

9 THE COURT: We're going to bring the jury in now.

10 MR. OLIVER: Thank you, your Honor.

11 MS. FADDIS: Your Honor.

12 THE COURT: Yes.

13 MS. FADDIS: The defendant still needs to make its  
14 Rule 50 motion.

15 THE COURT: OK. You've made your Rule 50 motion. I  
16 have to admit that I haven't had time to read your submission.

17 MS. FADDIS: We did not file one. I apologize. I  
18 emailed chambers this morning, and given the other homework we  
19 had, I was unable to put the summary in writing. I can put it  
20 on the record, if that's acceptable.

21 THE COURT: This doesn't have to be done now. Let's  
22 bring the jury in.

23 MS. FADDIS: Your Honor, I do anticipate that we know  
24 how the Court is going to --

25 THE COURT: I see, for opening -- for closing



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1 purpose of your closing statements. Am I right that you do  
2 need to know these for your closing statements, or do you not  
3 need to? And just take a few moments to think about it.

4 (Pause)

5 MR. REZVANI: Plaintiff does not need the ruling.  
6 Plaintiff can proceed.

7 MS. FADDIS: Your Honor, we can proceed with  
8 summations.

9 THE COURT: Very good. Then I'm reserving. I'll want  
10 briefing on it when you have the luxury of time. Thank you.

11 All right. We'll bring the jury -- I'm sorry, one  
12 moment.

13 (Pause)

14 On nominal damages, as I understand counsels'  
15 arguments, we have one example, that is one example of the  
16 Second Circuit affirming a trial court's decision not to  
17 instruct on nominal damages when a plaintiff asks for there to  
18 be no instruction on nominal damages. That's *Vilkhu*. I don't  
19 think we have examples of the Second Circuit ruling one way or  
20 the other on the permissibility of a judge giving an  
21 instruction on nominal damages over plaintiff's request not to  
22 do so. I'll let you think about that for a minute, and then  
23 I'll ask you to give me your response.

24 If the precedent I should be relying on is *Vilkhu*, I  
25 would omit anything on nominal damages.